UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

EARLE McSORLEY,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 02-97-B-S
	)	
TOM RICHMOND and TOWN OF CARMEL,	)	
	)	
Defendants	)	
	)	
and	)	
	)	
GLENNIS McSORLEY,	)	
	)	
Party-In-Interest	)	

ORDER GRANTING DEFENDANTS' MOTION TO AMEND

Plaintiff Earle McSorley brought a two count complaint in state court against the Town of Carmel and its town manager, seeking in Count I to quiet title to a piece of real estate in Carmel, Maine, and claiming in Count II that Tom Richmond, the town manager, violated his constitutional rights to substantive and procedural due process, when he deprived McSorley of his interest in the property. The defendants, Tom Richmond and the Town of Carmel, removed the matter to this court. They have now filed a motion to amend their answer to assert the defenses of waiver and estoppel. I now **GRANT** defendants' motion to amend (Docket No. 12) subject to this courts' receipt of a new amended complaint that properly reflects this court's prior order striking two different proposed affirmative defenses. (See Docket No. 7.)

Motion to Amend Standard

Pursuant to Federal Rule of Civil Procedure 15(a), leave to amend a complaint should be freely given:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

However, there are certain instances when amendment need not be allowed, such as a situation where the amendment would be futile. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 59 (1st Cir. 1990) ("Where an amendment would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters"). Likewise the First Circuit has more than once recognized that it is not an abuse of discretion to deny the motion to amend on the grounds that there was an 'undue delay' in filing the motion to amend. Larocca v. Borden, Inc., 276 F.3d 22, 32 (1st Cir. 2002).

Procedural History

Earle McSorley and the Town of Carmel have been embroiled in a dispute over his operation of gravel pits adjacent to the Horseback Road since at least 1993. The Town maintained that McSorley's gravel pits were so steep and close to the road that they compromised the safety and stability of the road and threatened to lead to the collapse of the road. The Town closed a segment of the road and attempted to get McSorley to take corrective action. Litigation in the Penobscot County Superior Court culminated in a 1999 order determining that McSorley was in contempt and imposing

civil sanctions of $2,600.00 and $50.00 per day "accruing daily hereafter until the pits are brought into compliance." Town of Carmel v. McSorley, Penobscot County Superior Court Docket No. CV-93-4, August 31, 1999. A detailed discussion of the history of the dispute between McSorley and the town that precedes this current foray into the federal court can be found in Town of Carmel v. McSorley, 2002 ME 33, ¶ 9, 791 A.2d 102, 106.

The defendants removed this complaint on June 3, 2002, and filed their answer the same day. I issued a scheduling order on June 6, 2002, that set July 25, 2002, as the deadline for amendment of the pleadings. On June 24, 2002, McSorley filed a motion to strike four of the eight affirmative defenses. Without objection on July 18, 2002, I granted the motion as to defenses number two, the statute of limitations, and number six, failure to comply with the notice provisions of the Maine Tort Claims Act on July 18, 2002. On August 15 McSorley filed a motion for partial judgment on Count I that remains pending. On September 5, 2002, defendants filed this motion to amend their answer. On the same date they filed their objection to the motion for partial summary judgment, arguing in large part that the doctrines of waiver and estoppel barred the entry of partial summary judgment.

Discussion

McSorley's summary judgment motion seeks partial summary judgment, barring the Town of Carmel from claiming title to the disputed property pursuant to the sheriff's deed that it received on October 30, 2001. He has not attempted to put forth a summary judgment record that would allow this court to make a determination about the validity of his own claim of title. The straightforward issue posed by that motion is whether the failure to comply with the precise wording of 14 M.R.S.A. § 2202's provisions regarding

notice to the debtor prior to a sheriff's sale renders the subsequent sheriff's deed defective and therefore ineffectual in passing title to the Town of Carmel. Defendants argue in their opposition to that motion that even if the sheriff was required to follow the precise dictates of the statute in order to effectively pass title, McSorley should be barred from using a failure to comply with the statute's dictates in support of his claim because of the doctrines of waiver and estoppel. McSorley does not deny that he received actual notice of the sheriff's sale from the town's counsel.

I need not determine the merits of defendants' affirmative defenses in ruling upon this motion to amend. The summary judgment record reveals that there is at least a colorable basis for the claims and therefore, under the Rule 15 standards applicable to motions to amend, I cannot conclude that the proposed amended answer and affirmative defenses would be futile before the merits of McSorley's motion for partial summary judgment have been determined.[1] I do not believe that matter will be resolved soon. Rather than delay this litigation, I will address the motion to amend now.

McSorley's primary objection to the motion to amend is that it is untimely and that if I allow the amendment he will have to decide whether or not he should depose Attorney Wendy Paradis, the principal witness for the defendants on this waiver/estoppel affirmative defense. Paradis' lengthy affidavit is part of the summary judgment record and it is true that if McSorley wanted to take her deposition he would have to do so in the five weeks remaining during the discovery period. However, I do not think that fact

[1] Defendants did submit a proposed amended answer and affirmative defenses with their motion. Unfortunately they merely recited the prior affirmative defenses and added waiver and estoppel. I assume that their incorporation of the prior stricken affirmative defenses of statute of limitations and failure to comply with the Maine Tort Claims Act was merely an error on their part because they never filed an objection to my prior order striking those affirmative defenses. Therefore I do require that they submit a new answer that properly reflects the prior order. The clerk will not docket the amended answer filed with the motion to amend on September 5, 2002.

would unduly prejudice McSorley. He has replied to defendants' response to his summary judgment motion admitting that most of the facts recited by Paradis are undisputed and that he is entitled to have this issue resolved in his favor nevertheless. The affirmative defenses of waiver and estoppel as asserted by the town appear to apply only to the extraordinarily narrow issue of notice of the sheriff's sale vis-à-vis the quiet title count. A simple contention interrogatory would determine if the defendants intended to assert the defenses for some other purpose. If they have that intent they have not made it plain in this motion and were I to find out that the necessary "new" discovery involved more than the issue of notice of the sheriff's sale, I could address McSorley's concerns at that time.

It is true that this motion to amend was untimely according to the terms of the scheduling order. However, the parties' initial disclosures reveal that both sides were fully cognizant of the operative facts, including primarily a letter from McSorley's counsel to Paradis' law firm in February 2000 that form the basis of this affirmative defense. The incorporation of these affirmative defenses into the answer does not unduly prejudice McSorley in any fashion and it will allow the ultimate decisionmaker to fully adjudicate the claims on their merits. The motion to amend, filed in the context of plaintiff's pre-discovery deadline motion for partial summary judgment, is not so untimely as to justify its disallowance on that basis alone.

The motion to amend the answer and affirmative defenses is **GRANTED,** subject to the requirement that defendants must file a corrected amended answer, see footnote 1, by September 30, 2002.

CERTIFICATE

A. The Clerk shall submit forthwith copies of this Order to counsel in this case.

B. Counsel shall submit any objections to this Order to the clerk in accordance with Fed. R. Civ. P. 72.

So Ordered.

Dated September 20, 2002

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Margaret J. Kravchuk
U.S. Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 02-CV-97

EARLE MCSORLEY v. RICHMOND, et al Filed: 06/03/02
Assigned to: Judge GEORGE Z. SINGAL Jury demand: Defendant
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt # in PCSC : is RE-2002-27

Cause: 28:1331 Fed. Question: Civil Rights Violation

EARLE MCSORLEY plaintiff	ARTHUR J. GREIF [COR LD NTC] JULIE D. FARR, ESQ. [COR] GILBERT & GREIF, P.A. 82 COLUMBIA STREET P.O. BOX 2339 BANGOR, ME 04402-2339 947-2223
v.	
TOM RICHMOND defendant	ANNE M. CARNEY, ESQ. [COR LD NTC] NORMAN, HANSON & DETROY 415 CONGRESS STREET P. O. BOX 4600 DTS PORTLAND, ME 04112 774-7000

CARMEL, TOWN OF defendant	ANNE M. CARNEY, ESQ. (See above) [COR LD NTC]

GLENNIS MCSORLEY
party in interest